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DATO' WAN HASHIM WAN DAUD

v.

MAZLAN IBRAHIM & ANOR

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HIGH COURT MALAYA, KOTA BHARU

ARIFIN ZAKARIA J

[CIVIL SUIT NO: 22-58-1996]

23 SEPTEMBER 1997

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CIVIL PROCEDURE: *Appeal - Appeal from registrar - Whether alleged defamatory words were pleaded - Whether alleged words could have a wide range of meanings as ascribed by plaintiff - Whether plaintiff complied with Supreme Court Practice 1977, O. 18 r. 8(3) - Whether statement of claim defective - Rules of the High Court 1980, O. 78 r. 3(3)*

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The plaintiff had filed a writ and statement of claim against the defendants for defamation. The second defendant had applied to strike out the plaintiff's suit under O. 18 r. 19 of the Rules of the High Court 1980 ('the RHC'), but the application was dismissed by the Senior Assistant Registrar. The 2nd defendant appealed to the High Court against that order on the following grounds: (i) that the words relied on by the plaintiff as being defamatory were not pleaded; (ii) that the ten ascribed meanings of the alleged defamatory words in the pleadings were totally incapable of conveying such varied meanings; (iii) that the plaintiff had failed to comply with requirements of O. 18 r. 8(3) of the Supreme Court Practice 1977; and (iv) that the claim was defective in failing to comply with O. 78 r. 3(3) of the RHC.

*f***Held:***g*

[1] It is necessary to construe allegedly defamatory words complained of, in their natural and ordinary meaning in the sense, in which reasonable men of ordinary intelligence would be likely to understand them. The recognised approach in *AJA Peter v. OG Nio & Ors* is that, as the law of defamation was concerned with the effect of the words used on ordinary people, account must be taken of the part that the layman's capacity for implication is much greater than that of the lawyers.

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[1a] The 2nd defendant was the publisher of the alleged defamatory words and construing those words in their natural and ordinary meaning, it could not be said that the statement of claim did not disclose any reasonable cause of action against the 2nd defendant.

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[2] The alleged defamatory words could convey some if not all of the meanings ascribed to them by the plaintiff. The form of pleading adopted by the plaintiff did not offend any principle or rule of pleading. a

[3] There is no equivalent provision in the RHC, to that of O. 18 r. 8(3) of the English Supreme Court Practice 1977. Therefore the defendant's objection on that ground could not succeed. b

[4] There is a distinction between express malice and malice in law. Malice in law is malice presumed from the fact of the publication of the defamatory words and there is no requirement to prove this form of defamation. Express malice is actual malice or malice in fact and has to be pleaded or proven. The RHC, O. 78 r. 3(3) refers to express malice and not to malice in law. c

[4a] The malice alleged by the plaintiff was a formal malice or a malice in law, and therefore he was not required by O. 78 r. 3(3) of the RHC to serve a reply on the defendant. The failure of the plaintiff to serve a reply to the defence would deny the plaintiff from adducing evidence of actual malice, but would not render the writ and statement of claim to be struck out under O. 18 r. 19 of the RHC. d

Obiter: e

[1] It is only in plain and obvious cases that recourse should be had to the summary procedure. The mere fact that the case is weak and unlikely to succeed is no ground for striking out the pleading.

[Defendant's application dismissed with costs.] f

Cases referred to:

Abu Bakar bin Hj Yusuf v. Mohamed Hamzah bin Hanapiah & Anor [1978] 2 MLJ 78 (cit)

AJA Peter v. OG Nio & Ors [1980] 1 MLJ 226 (refd)

Bank of China v. Asiaweek Ltd [1991] 2 MLJ 505 (refd) g

Belt v. Lawes [1882] 51 LJQB 359 DC (cit)

CC Ng & Brothers Sdn Bhd v. Government of State of Pahang [1985] 1 CLJ 235 (refd)

Colins v. Jones [1955] 2 All ER 145 (refd)

Dato' V Kanagalingam v. Tommy Thomas & Anor & Another Case [1997] 3 CLJ 413; JT(8) (refd) h

Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor [1984] 2 CLJ 88 (refd)

Ong Lean Sim & Anor v. Tio Kah Hin & Ors [1985] 1 MLJ 271 (refd)

Rajagopal v. Rajan [1972] 1 MLJ 45 (refd)

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- a Rediffusion (Hong Kong) Ltd v. Attorney General of Hong Kong [1970] AC 1136 (refd)*
Slim v. Daily Telegraph Ltd [1968] 2 QB 157 (refd)

Legislation referred to:

- b* Rules of the High Court 1980, O. 18 r. 19, O. 78 r. 3(3)
Supreme Court Practice 1977 [UK], O. 18 r. 8(3)
For the plaintiff - Mohd Apandi Ali; M/s Apandi Ali & Co
For the 2nd defendant - Peter Raj; M/s VK Lingam & Co
Reported by Eugene Ong

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JUDGMENT

Arifin Zakaria J:

- d* This is an appeal against the decision of the learned SAR dismissing the 2nd defendant's application to strike out the plaintiff's writ of summons and statement of claim under O. 18 r. 19 of the Rules of the High Court 1980 (RHC). The 2nd defendant specifically relies on grounds (a), (b) and (c) of para (1) of the rule. The application is supported by the affidavit of Ahmad Rejal Arbee, the Executive Director and Editor in chief of the 2nd defendant.

- e* At the outset I should state that as a general rule it is only in plain and obvious cases that recourse should be had to this summary procedure. The mere fact that the case is weak and unlikely to succeed is no ground for striking out of pleading. (See *Abu Bakar bin Haji Yusuf v. Mohamed Hamzah bin Hanapiah & Anor* [1978] 2 MLJ 78. Mohamad Dzaiddin J (as he then was) in *Ong Lean Sim & Anor v. Tio Kah Hin & Ors* [1985] 1 MLJ 271 at p. 272 said:
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... that is only in plain and obvious cases that resort should be had to summary procedure under this rule and the powers conferred by this rule will only be exercised where the case is clear beyond doubt.

- g* In *Loh Holdings Sdn. Bhd. v. Peglin Development Sdn. Bhd. & Anor* [1984] 2 MLJ 105 the Federal Court expressed a similar view, at p. 109 it said:

- h* It cannot be gainsaid that under O. 18 r. 19 pleadings will only be struck out in plain and obvious cases. So long as the statement of claim discloses some ground of action, the mere fact that the plaintiff is unlikely to succeed at the trial is no ground for striking out. See *Mooney v. Peat Marvick & Mitchell*.

- i* We need only refer to a passage from another authority referred to by learned counsel, that is the Privy Council decision in *Rediffusion (Hong Kong) Ltd. v. Attorney General of Hong Kong* [1970] AC 1136 where pp. 1158 and 1159 it said:

It is a well established principle that the summary power under RSC O. 18 r. 19 to strike out a writ or pleading as disclosing no reasonable cause of action or defence should be exercised only in plain and obvious cases ... No evidence is admissible on a cause of action summons ... the only documents that can be looked at are the writ, the documents referred to in the writ ...

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In *C.C. Ng & Brothers Sdn. Bhd. v. Government of State of Pahang* [1985] 1 MLJ 347 the Federal Court 350 again expressed the view that:

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The inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with caution (per Lord Diplock in *Tractors Malaysia Bhd. v. Tio Chee Hing*).

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In this case the writ and the statement of claim had been attacked essentially on four grounds. I shall deal with these grounds in turn.

Firstly, the learned counsel for the 2nd defendant submitted that the plaintiff, as it appears from the affidavit in reply, is relying upon the words in the caption "PAS YOUTH: CRISIS IS STATE SECRETARY'S FAULT" as being defamatory. He contended that the words in the said caption had not been pleaded by the plaintiff and therefore the plaintiff could not rely on those words in support of his case. He cited the case of *Collins v. Jones* [1955] 2 All ER 145 as authority, wherein at p. 146 it was stated:

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In a libel action it is essential to know the very words on which the plaintiff founds his claim. As Lord Coleridge, CJ said in *Harris v. Warre* (1) (4 CPD at p. 128):

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In libel and slander everything may turn on the form of words, and in older days plaintiffs constantly failed from small and even unimportant variance between words of the libel or slander set out in the declaration and the proof of them ... In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of his having used those defamatory expressions alleged, which is the fact on which the case depends.

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However, a close scrutiny of the statement of claim would disclose that the plaintiff did in fact plead the words in the caption. This is found in para 5 of the statement of claim which reads as follows:

5. Dalam keluaran akhbar The Sun bertarikh 3hb. Mei, 1996 itu, di bawah tajuk "PAS YOUTH: CRISIS IS STATE SECRETARY'S FAULT" Defendan Kedua telah menyiar dan mencetak kenyataan oleh Defendan Pertama dalam bahasa Inggeris dengan pernyataan berikut:

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- a* The Kota Bharu Pas Youth has accused State Secretary Datuk Wan Hashim Wan Daud of triggering off the crisis with the state government.
- The problem started when Hashim apparently used his authority to transfer administrative officers, creating what the division's youth chief Mazlan Ibrahim called defects in administration
- b* It is therefore incorrect to say that the words in the caption were not pleaded by the plaintiff as demonstrated by para 5 above.
- The plaintiff in para 6 alleged that the said statement in the newspaper (including the words in the caption) were libellous and intended to bring down the reputation and good name of the plaintiff. The issue is: does the pleading as it stands disclose any reasonable cause of action against the 2nd defendant. The 2nd defendant never deny that those words were in fact published by it as claimed by the plaintiff.
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- d* The task of the court at this stage is to consider the statement of claim alone and to see whether it discloses any reasonable cause of action against the 2nd defendant. The proper approach to this is as stated by the Federal Court in *Rajagopal v. Rajan* [1972] 1 MLJ 45 at p. 47:
- e* In deciding whether the words complained of were per se defamatory, it would be necessary to construe the words in their natural and ordinary meaning in the sense in which reasonable men of ordinary intelligence would be likely to understand them. Where, ... the words complained of have a secondary meaning by innuendo, consideration must be taken as to the manner of their publication and the persons to whom they were published.
- f* And further down the same page the court said:
- It is not what the appellant meant that is relevant in construing whether the words are defamatory but what the words convey to a reasonable person to whom they are published.
- g* In *A.J.A. Peter v. O.G. Nio & Ors* [1980] 1 MLJ 226 at p. 233 Abdul Hamid J (as he then was) again reiterated the correct approach to the issue:
- h* It is apparent that the recognised approach is that as the law of defamation is concerned with the effect of the words used on ordinary people account must be taken of the fact that the layman's capacity for implication is much greater than the lawyer's. And further, in some cases there may be special facts or circumstances known only to a limited number of people which for these people give the words used a special meaning or meanings.
- Having regard to the above authorities I am of the opinion that it cannot rightly be said that the statement of claim herein fails to disclose any reasonable cause of action against the 2nd defendant who undeniably is the publisher of the
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alleged defamatory words. For those reasons I dismissed the 2nd defendant's objection on the 1st ground. a

The 2nd ground relied upon by the 2nd defendant is that the plaintiff at para. 8 of the statement of claim pleads that the alleged defamatory words have a wide range of natural and ordinary meanings as stated therein, namely: b

- (a) Plaintiff adalah seorang yang tidak beretika dalam menjalankan tugas;
- (b) Plaintiff telah bertanggungjawab di atas kewujudan krisis pentadbiran dalam Negeri Kelantan;
- (c) Plaintiff adalah seorang yang tidak jujur; c
- (d) Plaintiff adalah seorang Setiausaha Kerajaan Negeri yang buruk dan keji;
- (e) Plaintiff tidak layak untuk memegang jawatan sebagai Setiausaha Kerajaan Negeri;
- (f) Plaintiff adalah seorang yang tidak boleh dipercayai; d
- (g) Plaintiff adalah seorang yang suka menyalahgunakan kuasa;
- (h) Plaintiff adalah seorang pengacau.

The learned counsel referred me to the case of *Bank of China v. Asiaweek Ltd.* [1991] 2 MLJ 505 where at p. 508 Thean J said: - e

The plaintiff in para. 5 of the statement of claim ascribed to the words no less than six meanings cumulatively (the details of which I have earlier set out). I do not think that to ordinary reasonable persons the word would convey such a comprehensive range of meanings. f

The learned counsel for the 2nd defendant contended the plaintiff cannot ascribe 10 varied, natural and ordinary meanings to the alleged defamatory words as set out para. 8 of the plaintiff's statement of claim as this is a wholly unreasonable interpretation and the alleged defamatory words are totally incapable of conveying such varied meanings. Having considered the alleged defamatory words I am of the opinion that those words could convey some if not all of the meanings ascribed to them by the plaintiff. I find that the form of pleading adopted by the plaintiff herein does not offend any principle or rule of pleading that I am aware of. L. Denning MR in *Slim v. Daily Telegraph Ltd.* [1968] 2 QB 157 at p. 169 said: g
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In such case the customary form of pleading has been for the pleader to say: "The said words meant and were understood to mean" so and so setting out all the derogatory imputations that he can think of. Such has always been the practice to my certain knowledge. i

a Therefore, in my judgement there is nothing objectionable in the form of pleading adopted by the plaintiff in the instant case. For the above reasons the 2nd ground of objection raised by 2nd defendant must be rejected.

b The third ground of objection on the plaintiff's pleading (which was erroneously stated as the 4th ground) is that the plaintiff has failed to comply with the requirements of O. 18 r. 8(3) of the Supreme Court Practice 1977. The learned counsel was referring to the English Supreme Court Practice 1977. There is no equivalent provision in our RHC. The plaintiff's counsel submitted that exemplary damage like compensatory or aggravated damage is part of general damages and as such is claimable and quantifiable. On the authority of the case of *Dato' V. Kanagalingam v. Tommy Thomas & Anor & Another Case* [1997] CLJ JT (8) he submitted that there are no specific provisions in the relevant statutes, namely the Defamation Act 1957 and the RHC, that prohibit the plaintiff from quantifying exemplary damages.

d Since there is no equivalent provision to that of O. 18 r. 8(3) of English Supreme Court Practice in our RHC therefore the defendant's objection on this ground cannot succeed. On the quantification of the exemplary damages I agree with Rahmah Hussain J that it may be quantified so as obviate any element of surprise to the defendant.

e Finally the 2nd defendant contended that the pleading in para 6 of the statement of claim is defective in failing to comply with O. 78 r. 3(3) of RHC. Para 6 reads as follows:

f Pernyataan-pernyataan, di dalam akhbar tersebut adalah suatu fitnah semata-mata yang bertujuan untuk menjatuhkan maruah dan nama baik plaintiff.

The 2nd defendant contended that the plaintiff is implying malice on the part of the 2nd defendant. He submitted under O. 78 r. 3(3) of RHC the plaintiff is required to give particulars of the facts and matters from which malice is inferred. No such particulars had been given by the plaintiff, therefore, the 2nd defendant contended, the plaintiff's claim on this ground should be struck out. Order 78 r. 3(3) RHC provides:

h Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his statement of claim give particulars of the facts on which he relies in support of the allegation of malice, but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he must serve a reply giving particulars of the facts and matters from which the malice is to be inferred.

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The plaintiff's counsel in his reply submitted that para 6 of the statement of claim does not contain any allegation of express malice or malice in fact. What was alleged by the plaintiff was just a formal malice or malice in law. Therefore, he contended no reply as required by r. 3(3) of O. 78 need to be served on the defendant.

From the authorities there is a distinction being drawn between express malice and malice in law. The latter kind of malice may be presumed from the fact of the publication of defamatory words, so that the plaintiff need not prove it. (See *Belt v. Lawes* [1882] 51 LJQB 359, DC). Whereas express malice which is actual malice or malice in fact has to be pleaded and proven by the plaintiff. I agree with the submission of the learned counsel for the plaintiff that O. 78 r. 3(3) RHC refers to this latter kind of malice and not to malice in law. Therefore, if the plaintiff merely seeks to rely on malice in law there is no requirement for the plaintiff to serve a reply to the defendant's defence. The failure of the plaintiff to serve a reply to the defence would of course deny the plaintiff from adducing evidence of actual malice which is necessary in order to rebut the defence of qualified privilege or fair comment raised by the 2nd defendant. However, such a failure would not render the writ and the statement claim to be struck out under O. 18 r. 19 of the RHC.

For the reasons given above I dismissed the 2nd defendant's application with costs.

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